



Adam Steinbaugh <adam@thefire.org>

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## Response to public records request dated October 15, 2018

2 messages

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**Erin Busch** <ebusch@nebraska.edu>  
To: "adam@thefire.org" <adam@thefire.org>

Fri, Oct 26, 2018 at 2:49 PM

Dear Mr. Steinbaugh:

In accordance with *Neb. Rev. Stat. § 84-712, et seq.*, you requested the University of Nebraska at Kearney, the University of Nebraska Omaha, and the University of Nebraska-Lincoln (collectively the "University") to provide you with certain records. Your specific request to UNL is printed below in italics with the response to the request following each item. All three campuses received a similar request and this response is on behalf of all three campuses. These responses are provided to you following a reasonable search of the records at the University. You have requested:

*a. A copy of the settings for the Facebook page maintained by the University of Nebraska-Lincoln (available at <https://www.facebook.com/UNLincoln>). This list is accessible by (A) logging into the Facebook page as an administrator, and then (B) clicking "Settings" at the top of the official page. The URL should look like: <https://www.facebook.com/UNLincoln/settings/?tab=settings>.*

The settings information that you request is not a record subject to disclosure under the public records act and therefore the University will not provide this information. The settings information is design or setup information related to the University's Facebook pages and is not a record. The District Court of Lancaster County, Nebraska's Order in a public records request case is instructive:

[T]he court analyzes the plaintiff's request for records and documents stored electronically in the JUSTICE program against a similar request that may be made for records and documents in a court file maintained by a clerk of a court. When a person goes into a clerk's office and requests to see information in a paper file, he or she is provided with the paper court file, which, except for records and documents

filed electronically, contains the paper records and documents filed with the clerk's office and placed into the file. He or she is not provided with information related how or where the paper court file is stored (e.g. in a file cabinet or lectriever). Likewise, when a person goes into a clerk's office and sits down at a computer to access electronically stored records and documents, he or she is able to access and view the records and documents stored in the JUSTICE program, but not the workings of the program used to store and retrieve the records and documents.

*Friedman v. Steel*, Case No. CI 14-1907 (Dist. Ct. of Lancaster Co., Nebraska April 25, 2015).

*b. A copy of the list of people or pages banned from the Facebook page referenced above. This list is accessible by: (A) logging into the Facebook page as an administrator; (B) clicking "Settings" at the top of the official page, (C) clicking "People and Other Pages" in the left column, and (D) selecting "Banned People and Pages" from the drop-down menu. The final URL should look like: [https://www.facebook.com/UNLincoln/settings/?tab=people\\_and\\_other\\_pages](https://www.facebook.com/UNLincoln/settings/?tab=people_and_other_pages).*

Please see records responsive to your request at the following link: <https://nebraska.box.com/s/k7oxfzyp73fl3qk5alo0arsgbmsbnj55>. The University redacted account names and pictures for employees of the University because the redacted information contains personal information in records regarding personnel of the University that is not routine directory information. Accordingly, such information is withheld pursuant to *Neb. Rev. Stat.* § 84-712.05(7). The Policies of the Board of Regents of the University of Nebraska define "the term 'personal information' when used in relation to faculty and staff personnel records" as "all records and documents pertaining to any person employed by the University, except salary and routine directory information." See Policy of the Board of Regents of the University of Nebraska 6.7.

The University also redacted account names and pictures of students because the redacted information contains personally identifiable student information that is not public directory information. The information and records were withheld based on 20 U.S.C. § 1232g and the regulations adopted thereunder and *Neb. Rev. Stat.* § 84-712.05(1) because the information contains personally identifiable student information. See also Board of Regents Policy 5.10 at <https://nebraska.edu/-/media/unca/docs/offices-and-policies/policies/board-governing-documents/board-of-regents-policies.pdf?la=en>.

c. A list of the "blocked accounts" by the Twitter account maintained by the University of Nebraska-Lincoln (available at <https://twitter.com/UNLincoln>). This list is accessible by navigating to this URL while logged into the account: <https://twitter.com/settings/blocked>.

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The following is provided to you in accordance with *Neb. Rev. Stat.* § 84-712.04:

1. The undersigned is the public official responsible for the decision to withhold any record for the reasons discussed above.

2. *Neb. Rev. Stat.* § 84-712.03 provides certain rights of judicial review or administrative review by the Attorney General of the State of Nebraska of this decision. A copy of this statute is enclosed.

Very truly yours,

Erin E. Busch

Director University Records

Erin E. Busch  
Director University Records/Associate General Counsel  
University of Nebraska  
Phone (402) 472-1232  
ebusch@nebraska.edu

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**Neb Rev Stat 84-712 03 (00010404xA3664).pdf**  
9K

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**Adam Steinbaugh** <adam@thefire.org>

Fri, Oct 26, 2018 at 3:04 PM

To: ebusch@nebraska.edu

Ms. Busch --

I'd be interested in reviewing *Friedman v. Steel* if you have a copy of it.

In the meantime, however, would the university be willing to provide screenshots of the settings for the "Page Moderation" and "Profanity Filter" fields? These are the fields that I'm interested in. That information relates to the words a state actor prohibits from being posted in a public forum, raising concerns not only about notice as to what language is or is not prohibited in a public forum, but also First Amendment issues. Similarly, I'm not sure that the university's posture here is internally consistent: it can reveal settings governing what *persons* are automatically prohibited from posting, but not the settings governing what *content* is automatically prohibited from being posted. I'm not sure how that squares with *Friedman*.

Best,

**Adam B. Steinbaugh**  
Director, Individual Rights Defense Program  
Foundation for Individual Rights in Education  
510 Walnut Street  
Suite 1250

Philadelphia, PA 19106  
(215) 717-3473  
[adam@thefire.org](mailto:adam@thefire.org)

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[Quoted text hidden]



Adam Steinbaugh <[adam@thefire.org](mailto:adam@thefire.org)>

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## Response to follow-up dated October 26, 2018

1 message

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**Erin Busch** <[ebusch@nebraska.edu](mailto:ebusch@nebraska.edu)>  
To: Adam Steinbaugh <[adam@thefire.org](mailto:adam@thefire.org)>

Fri, Nov 2, 2018 at 11:57 AM

Mr. Steinbaugh,

Attached is the *Friedman v. Steel* decision. The University stands on its previous response. Thank you.

Erin E. Busch  
Director University Records/Associate General Counsel  
University of Nebraska  
Phone (402) 472-1232  
[ebusch@nebraska.edu](mailto:ebusch@nebraska.edu)

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**From:** Adam Steinbaugh [mailto:[adam@thefire.org](mailto:adam@thefire.org)]  
**Sent:** Friday, October 26, 2018 2:04 PM  
**To:** Erin Busch <[ebusch@nebraska.edu](mailto:ebusch@nebraska.edu)>  
**Subject:** Re: Response to public records request dated October 15, 2018

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**Friedman v. Steele Order.pdf**

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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

BRUCE R. FRIEDMAN,

)

Case Number CI 14-1907

)

Petitioner,

)

v.

)

**ORDER**

)

COREY R. STEEL,

)

)

Respondent.

)

On June 3, 2014, the plaintiff Bruce R. Friedman filed a petition and complaint for mandamus seeking, in part, the issuance of a peremptory writ compelling the defendant Corey R Steel, the State Court Administrator for the State of Nebraska, to provide access to or copies of certain computer-related materials under the public records statutes.<sup>1</sup> An order to show cause why a writ of mandamus should not be issued was entered on October 21. On November 13, the defendant filed his answer and response to the order to show cause.

Trial was held on December 23, 2014, and January 26, 2015. The plaintiff adduced evidence and rested. At the close of the plaintiff's case, the defendant's motion to dismiss or for a directed verdict was taken under advisement. The defendant adduced evidence, rested and renewed his motion, which was again taken under advisement. The plaintiff adduced rebuttal evidence and rested. The defendant rested. The matter was argued and taken under advisement.

The court finds as follows:

**1. Motion to Dismiss or for Directed Verdict:** The defendant's motion to dismiss or for directed verdict is denied.

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<sup>1</sup> NEB. REV. STAT. §§ 84-712 et seq. (Reissue 2014).

LANCASTER COUNTY

2015 APR 23 AM 9 05

CLERK OF THE  
DISTRICT COURT



001526817D02

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2. **Discussion:** NEB. REV. STAT. § 84-712.03 (Reissue 2014) provides, in part, as follows:

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 may elect to: (a) File for speedy relief by writ of mandamus in the district court within whose jurisdiction the state . . . officer who has custody of the public record can be served . . .

...

(2) In any suit filed under this section, the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such other equitable relief as may be proper. The court shall determine the matter de novo and the burden is on the public body to sustain its action. . . .

As the Nebraska Supreme Court stated in *State ex rel. Nebraska Health Care Ass'n. v. HHS Fin. & Support*<sup>2</sup>, the language of § 84-712.03 makes it “clear that the burden in a case such as this is not on the party seeking the writ of mandamus, but on the party attempting to withhold records.” In addressing the quantum of proof and the procedure to be used when a request for the issuance of a writ of mandamus under the public records statutes is made, the *Nebraska Health Care* court went on to state, in some detail:

The quantum of proof necessary to sustain the burden of proof is unspecified by the statute. However, we have held that in a mandamus action, the relator must show ‘clearly and conclusively’ that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. In the context of § 84-712.03, the burden of proof has been placed by statute on the public body opposing the issuance of the writ, and we determine that the quantum of proof necessary to sustain this burden should remain the same as in any mandamus action.

This determination is supported by the public policy considerations underlying the statute. Section 84-712.01 (3) provides:

Sections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, *audit*, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order

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<sup>2</sup> 255 Neb. 784, 788, 587 N.W.2d 100, 104 (1998).

that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them.

(Emphasis supplied.)

With this public policy consideration in mind, we conclude that the burden is appropriately placed on the Department to show by clear and conclusive evidence that the records sought by the NHCA fit within the bounds of a statutory exception to the disclosure requirement.

Requiring the public body to demonstrate that an exception applies to the disclosure of a particular public record does not, however, change the fact that it is the initial responsibility of the relator to demonstrate that the record in question is a public record within the meaning of § 84-712.01. Under § 84-712.03, a writ may be sought by ‘any person denied any rights granted by sections 84-712 to 84-712.03 . . . .’ In order to establish standing and jurisdiction, therefore, it must be shown that the party seeking mandamus has been denied rights under § 84-712. A necessary component of this showing is that the party was seeking a record that is a ‘public record’ within the meaning of § 84-712.01.

Therefore, we hold that when a writ of mandamus is sought pursuant to § 84-712.03, the party seeking the writ must first show (1) that the party is a citizen of the state or other person interested in the examination of the public records, (2) that the document sought by the party is a public record as defined by § 84-712.01, and (3) that the party has been denied the access to the public record guaranteed by § 84-712. Thereafter, if the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions provided by § 84-712.05 or § 84-712.08.<sup>[3]</sup>

Under this shifting burden of proof procedure, the burden is initially with the plaintiff. Whether the plaintiff has met his initial burden rests solely on a determination of whether the information he requested consists of public records, as defined by statute.<sup>4</sup>

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<sup>3</sup> *Id.* at 789-790, 587 N.W.2d at 105 (citations omitted).

<sup>4</sup> While the court has serious concerns about whether the defendant’s letter of June 2, 2014, fully complied with NEB. REV. STAT. § 84-712(4) (Reissue 2014), the issue at this juncture is whether the requested information is public records and that will be the focus of the court’s discussion.

The plaintiff's complaint seeking the issuance of a writ of mandamus relates to his May 23, 2014, letter to the defendant<sup>5</sup> requesting, with specific exceptions, the production of copies of information relating to "the Case Management System (CSM)". More specifically, the plaintiff requested "the following data and records from case manage system known as JUSTICE":

1. The most recent complete copy or duplicate of the Master Index produced.
2. A complete copy or duplicate of any and all database schemas.
3. A complete copy or duplicate of any and all tables in the databases(s).
4. A complete copy or duplicate of any and all indexes in the databases(s).
5. A complete copy or duplicate of any and all triggers in the databases(s).
6. A complete copy or duplicate of any and all constraints in the databases(s).
7. A complete copy or duplicate of any and all sequences in the databases(s).
8. A complete copy or duplicate of any and all views in the databases(s).
9. A complete copy or duplicate of any and all user defined data in the databases(s).
10. A complete copy or duplicate of any and all user defined data types in the databases(s).

In his June 2, 2014, letter to the plaintiff<sup>6</sup>, the defendant, in response to ¶ 1 of the plaintiff's request, stated:

As to your request #1, 'The most recent complete copy or duplicate of the Master Index produced[]', t[he Judicial Branch has a 'Master Index' as part of JUSTICE Case Management System, but we do not produce it, or have a copy or duplicate of a 'Master Index.' Neb. Rev. Stat. § 84-712 does require a public agency to create documents which do not otherwise exist. . . . Therefore, we have no records responsive to your request #1.

With respect to ¶¶ 2 through 10 of the plaintiff's request, the defendant responded "We have no records responsive to these requests." During his testimony, the defendant clarified that the information described in ¶¶ 2 through 10 does exist, however, it is his opinion it is not public records.

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<sup>5</sup> Exhibit 6, page 6.

<sup>6</sup> Exhibit 6, page 9.

NEB. REV. STAT. § 84-712 (Reissue 2014) provides, in relevant part:

(1) Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

...

(3) ...

(e) This section shall not be construed to require a public body or custodian of a public record to produce or generate any public record in a new or different form or format modified from that of the original public record.

...

(4) Upon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, an estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04 ...

NEB. REV. STAT. § 84-712.01(1) (Reissue 2014) defines “public record” as follows:

Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include *all records and documents, regardless of physical form*, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

(Emphasis added.)

The JUSTICE (judicial user system to improve court efficiency) program is described as a proprietary computer program that has been involved in an ever-evolving development over at least the last 20 years. The IBM DB2 database is the underlying database for the JUSTICE program. The JUSTICE program is a customized program written, generally speaking, to insert data into, to extract data from and to enhance the DB2 database.

The JUSTICE program is a case management system designed primarily to store and manage the records of the Nebraska trial court system. There are 93 servers running the JUSTICE program across the state, one for each county, with two databases in each server, for a total of 186 separate databases. (A database was been described as a structure container which stores information and a server as the location where a database resides.) As a single-case management system, the JUSTICE program is used by the Nebraska trial courts to record case information electronically. That is, among other things, it stores electronic versions of court-filed documents, which are accessible via an emulator or the internet. It also provides financial management for the trial courts.

Richard Burkhardt, a computer programmer, wrote and designed a majority of the JUSTICE program and has been involved in its development over the past 24 years. He described the JUSTICE program as a distributed system. That is, with two exceptions (i.e., the Master Index and images files held on the central server in Lincoln), the 186 databases each run independent of each other.

Some records stored on the JUSTICE program are electronically shared, through interfacing, with a number of other state agencies. For example, the Department of Health and Human Services, the Department of Motor Vehicles, the State Treasurer, the Bureau of Vital Statistics and the Nebraska State Patrol.

There are three ways to access the JUSTICE program - through the use of an ID secured from the Court Administrator's office; through the use of a public terminal available

at a courthouse or through Nebraska.gov. Through those access channels, all of the “public data” is accessible.<sup>7</sup>

While there was considerable testimony as to what is and is not a “source code”; whether the plaintiff’s request, which nowhere contains the words “source code”, actually requires access to the JUSTICE program “source code”<sup>8</sup>; whether release of the information sought by the plaintiff would create a security risk to the JUSTICE program; and other similar questions/issues, resolution of those types of questions is not necessary to determine whether the plaintiff has requested public records. As set out in § 84-712.01(1), public records include “all records and documents, regardless of physical form” of or belonging, among others, to the state or any state agency, branch or department, even if maintained in computer files. Based upon the evidence, the court finds the plaintiff’s request needs to be addressed in three parts - ¶ 2 and ¶¶ 4 through 10; ¶ 3; and ¶ 1.

**a. Paragraphs 2 and 4 through 10:** These paragraphs do not seek to obtain records or documents stored in the JUSTICE program. These paragraphs are requesting database-design information. They seek to go behind the records and documents stored in the JUSTICE program to access the structure or components of the JUSTICE program used to store the records and documents filed in the program. They seek to discover the pathways created to insert and extract data into and from the JUSTICE program, not to secure records and documents stored within the program.<sup>9</sup>

Recognizing it is not totally analogous, the court analyzes the plaintiff’s request for records and documents stored electronically in the JUSTICE program against a similar

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<sup>7</sup> A variety of documents and information stored in the JUSTICE program is not available to the public (e.g., social security numbers, bank account numbers, sealed pleadings/documents).

<sup>8</sup> Pursuant to the Information Security Policy of the Nebraska Information Technology Commission, “[a]ccess to source code libraries for both agency business applications and operating systems must be tightly controlled . . .” Exhibit 73, p. 18 (4.9.10). The Nebraska Information Technology Commission is created through the Information Technology Infrastructure Act, NEB. REV. STAT. §§ 86-501 through -530 (Reissue 2014).

<sup>9</sup> The court believes this conclusion is consistent with the testimony of David Talbot, who described his opinion of the functions of the information requested by the plaintiff (e.g., “triggers” and “constraints”).

request that may be made for records and documents in a court file maintained by a clerk of a court. When a person goes into a clerk's office and requests to see information in a paper file, he or she is provided with the paper court file, which, except for records and documents filed electronically, contains the paper records and documents filed with the clerk's office and placed into the file. He or she is not provided with information relating how or where the paper court file is stored (e.g., in a file cabinet or a lectriever). Likewise, when a person goes into a clerk's office and sits down at a computer to access electronically stored records and documents, he or she is able to access and view the records and documents stored in the JUSTICE program, but not the workings of the program used to store and retrieve the records and documents.

The court finds that the information requested by the plaintiff in ¶ 2 and ¶¶ 4 through 10 are not public records.

**b. Paragraph 3:** In ¶ 3, the plaintiff requests information relating to the "tables in the [JUSTICE program] database(s)". The reference to "tables" may be a request for the structure of the "tables" of the JUSTICE program or may be a request for records and documents contained in the "tables" of the entire program (i.e., the 186 databases).<sup>10</sup>

In considering the nature of the plaintiff's request in ¶ 3, the court is mindful of its determination that ¶ 2 and ¶¶ 4 through 10 did not seek the production of documents and records, but, rather, sought the revelation of the structure or components of the JUSTICE program used to store the records and documents filed in the program.

According to Mr. Burkhart, if the request in ¶ 3 is not asking for the structure of the "table", then the requests in ¶ 2 and ¶¶ 4 through 10 do not make any sense, since they "are all built on top of that table schema". According to Mr. Burkhart, "the table is the object that really controls the court's data or the information about the court case".

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<sup>10</sup> In his request, the plaintiff did not specify and, in his response, the defendant did not seek clarification.

Considering the totality of the plaintiff's requests, the court finds that ¶ 3 is requesting a component of the JUSTICE program and not any documents or records that may be stored in the "table".<sup>11</sup> The court finds that the information requested by the plaintiff in ¶ 3 is not public record.

**c. Paragraph 1:** With respect to ¶ 1 of the plaintiff's request, the JUSTICE program does contain a "Master Index". The Master Index maintained on the central server in Lincoln contains public and non-public data, which consists of over 14 million records, but very little court case information, and is updated nightly. To provide data from the Master Index that contains just public records and documents, the index would have to be altered to remove non-public data. According to the evidence presented, after altering the Master Index to exclude non-public data, any distribution would, in all probability, amount to a bulk distribution and be in violation of rules promulgated by the Nebraska Supreme Court relating to "Public Access to Electronic Information"<sup>12</sup>, which apply to JUSTICE.

As noted in § 84-712(3)(e), the right of citizens to examine public records is "... not [to] be construed to require a public body or custodian of a public record to produce or generate any public record in a new or different form or format modified from that of the original public record."<sup>13</sup> While it is clear the "Master Index" contains some documents and records that would be public records under § 84-712.01(1), to extract those documents and records from the Master Index would require the creation or generation of a new document or record in violation of § 84-712(3)(e).

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<sup>11</sup> This determination, too, is consistent with the testimony of Mr. Talbot. When asked what he would produce if requested to provide a copy of a database "table", after stating it was difficult to express in layman's terms, Mr. Talbot said he would try to provide a copy of the database table that would be readable. While he discussed tables containing documents, he did not mention the production of documents and records as a response he would make to a request for a copy of the "tables".

<sup>12</sup> NEB. CT. R. §§ 1-801 through -810 (rev. 2008). Pursuant to Rule § 1-806, bulk distribution, which is defined as "the distribution of all, or a significant subset, of the information in court records, as is and without modification or compilation", Rule § 1-802(H), of "court records in electronic form is not allowed except to preserve records and comply with courts' records retention schedules".

<sup>13</sup> NEB. REV. STAT. § 84-712(3)(e)(Reissue 2014).

Having concluded that the information requested by the plaintiff in ¶¶ 2-10 is not public record and that the public record information requested in ¶ 1 is not available without the generation of a new document or record, the court does not consider whether NEB. REV. STAT. § 84-712.05(3) and (8) (Reissue 2014) apply to the plaintiff's requests.

**3. Conclusion:** For the reasons set forth herein, the court finds that the plaintiff's request for the issuance of a writ of mandamus should be, and it hereby is, denied.

Each party is to pay his attorney's fees and costs incurred herein.

A copy of this order is sent to the plaintiff and to counsel for the defendant by the clerk's office via eNotice.

Dated April 23, 2015.

SO ORDERED.

BY THE COURT



Paul D. Merritt, Jr.  
District Judge

c: Ms. Leslie S. Donley

**CERTIFICATE OF SERVICE**

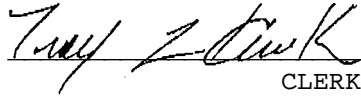
I, the undersigned, certify that on April 24, 2015 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Leslie S Donley  
leslie.donley@nebraska.gov

Bruce R Friedman  
bruce@amyandbruce.com

Date: April 24, 2015

BY THE COURT:

  
CLERK





**Edward T Duensing**

11/12/17



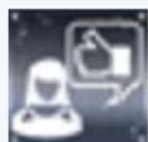
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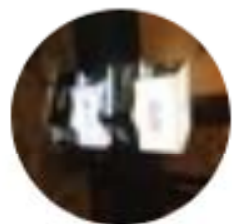
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